Hendrick International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-20 OF 1997

ABDUL HAMID MOHAMAD, ABDUL KADIR SULAIMAN AND RICHARD MALANJUM JJCA

27 MARCH 2003

Civil Procedure *— Appeal — Decision of trial judge — Oppression petition struck out by High Court on the ground that oppression petition was presented after company had been ordered to be wound up — Oppression petition was in fact presented before company had been ordered to be wound up — Whether decision of High Court judge erroneous*

Companies and Corporations *— Members rights — Oppression — Petition for relief — Oppression petition filed before order made to wind up company — Oppression petition struck out by High Court on the ground that oppression petition was presented after company had been ordered to be wound up — Whether decision of High Court judge erroneous*

This was the appellant's appeal against the decision of the High Court allowing the application of the respondents to strike out the appellant's petition ('the oppression petition') filed pursuant to s 181 of the Companies Act 1965 ('the Act') in respect of a joint venture company, 'Trans-Pacific Hotels Sdn Bhd' ('the said company') set up by the appellant and the first respondent on equal equity shareholding. The oppression petition was filed in 16 January 1996 and in it, the appellant sought various reliefs, including, inter alia, an order requiring the first respondent to purchase the appellant's shares in the said company at a price of RM7,998,000 or at a fair value to be assessed by a firm of independent auditors. Prior to the filing of the oppression petition, the first respondent had on 18 October 1995 filed a winding up petition ('the winding up petition') against the said company pursuant to s 218(1)(i) of the Act. On 19 January 1996, the winding up petition was heard with the winding up order being granted. The said company was subsequently administered by a liquidator appointed upon the granting of the winding up order. On 26 March 1996, the respondents filed a summons in chambers in encl 18 for the orders, inter alia, that the oppression petition be struck out pursuant to O 18 r 19(i)(a), (b), (c) and (d) of the Rules of the High Court 1980 ('RHC'). Enclosure 18 was dismissed by the senior assistant registrar. Subsequently, the respondents appealed to the judge in chambers who heard the appeal and allowed it thereby effectively striking out the oppression petition. The judge in chambers allowed the appeal on the ground that the oppression petition was presented after the said company had been ordered to be wound up. However, in his postscript to the judgment, the judge in chambers stated that he had mistakenly thought that the oppression petition was presented after the said company had been wound up when in fact the

A oppression petition was presented before the said company was ordered to be wound up. This was the appeal by the appellant.

Held, dismissing the appeal (by a majority):

(1) (per **Abdul Hamid Mohamad** and **Richard Malanjum JJCA**) Since a winding up order had already been granted to wind up the said company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s 181 of the Act and as contained in the said petition could no longer be sustained. From the time of the appointment of a liquidator, it was the liquidator who was running the affairs of the said company. It should therefore be opened to the aggrieved party to bring his complaint to the liquidator without having to resort to s 181 of the Act. In any event and as found by the learned judge in the court below that in the instant case it was never the contention of the appellant that the liquidator appointed had allowed either the oppressive acts or their effects to subsist (see pp 752D–E, 753H–I); *Webb v Stanfield* [1990] 8 ACL 715 followed.

(2) (per **Abdul Hamid Mohamad** and **Richard Malanjum JJCA**) Another compelling reason why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator was the provision of s 223 of the Act, which provided that 'any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void'. Thus, in view of this prohibition, the prayers in the said petition requiring the first respondent to purchase the appellant's shares in the said company at a price of RM7,998,000 or at a fair value to be assessed by a firm of independent auditors cannot be entertained unless sanctioned by the court (see p 754B–D).

(3) (per **Abdul Hamid Mohamad** and **Richard Malanjum JJCA**) The other obstacle in the instant case was that the liquidator was not substituted for or added as a party in the said petition. It would be difficult to bind the liquidator in respect of an order made on the sales of shares of the said company as prayed for in the said petition (see p 754D–E).

(4) (per **Abdul Kadir Sulaiman JCA** dissenting) The said company was only ordered to be wound up upon the winding up petition of the first respondent three days after the presentation of the oppression petition by the appellant. Prima facie therefore, as at the date of the presentation of the oppression petition, it was a valid petition. Therefore, the order striking off the oppression petition on the ground that the said company had been ordered to be wound up was a power wrongly exercised (see pp 755G–H, 756B); *Webb v Stanfield* [1990] 8 ACLC 715, *Fargro Ltd v Godfroy*

[1986] 1 WLR 1134 and *Ferguson v Wallbridge* [1935] 3 DLR 66 distinguished.

(5) (per **Abdul Kadir Sulaiman JCA** dissenting) Having approached the matter upon a wrong premise that the oppression petition was presented after the said company had been ordered to be wound up, the High Court judge's reasoning for the striking out of oppression petition on that ground therefore, cannot be supported. The appellant should not have been penalized for doing something which it was entitled under the law to do when the said company was then not in liquidation. By the postscript to the judgment, the learned High Court judge had realized the mistake he had made earlier and this showed that the order he had made upon the application of the respondents under O 18 r 19 of the RHC was clearly erroneous (see pp 756F–H, 757B).

(6) (per **Abdul Kadir Sulaiman JCA** dissenting) Such being the position, there was no alternative left by to remit the matter back to the High Court for the purpose of hearing the oppression petition on the merit (see p 757D).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden-responden untuk membatalkan petisyen perayu ('petisyen menindas tersebut') yang difailkan menurut s 181 Akta Syarikat 1965 ('Akta tersebut') berhubung satu syarikat usahasama, 'Trans-Pacific Hotels Sdn Bhd' ('syarikat tersebut') yang ditubuhkan oleh perayu dan responden pertama dengan pegangan saham ekuiti yang sama rata. Petisyen menindas tersebut telah difailkan pada 16 Januari 1996 dan di dalamnya, perayu telah memohon pelbagai relief, termasuklah, antara lain, satu perintah menghendaki responden pertama membeli saham-saham perayu dalam syarikat tersebut pada harga RM7,998,000 atau pada satu nilai adil yang ditaksirkan oleh sebuah firma juruaudit yang berasingan. Sebelum pemfailan petisyen menindas tersebut, responden pertama pada 18 Oktober 1995 telah memfailkan satu petisyen penggulungan ('petisyen penggulungan tersebut') terhadap syarikat tersebut menurut s 218(1)(i) Akta tersebut. Pada 19 Januari 1996, petisyen penggulungan tersebut telah didengar di mana perintah penggulungan diberikan. Syarikat tersebut kemudian telah dikendalikan oleh seorang penyelesai yang dilantik selepas pemberian perintah penggulungan tersebut. Pada 26 Mac 1996, responden-responden telah memfailkan satu saman dalam kamar dalam lampiran 18 untuk perintah-perintah, antara lain, bahawa petisyen menindas tersebut dibatalkan menurut A 18 k 19(i)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Lampiran 18 telah ditolak oleh penolong kanan pendaftar. Berikutan itu, responden-responden telah merayu kepada hakim dalam kamar yang mendengar rayuan tersebut dan membenarkannya dengan itu menguatkuasakan

A pembatalan petisyen menindas tersebut. Hakim dalam kamar telah membenarkan rayuan tersebut atas alasan bahawa petisyen menindas tersebut telah dikemukakan selepas syarikat tersebut diperintahkan untuk digulung. Namun begitu, di dalam postskrip beliau kepada penghakiman tersebut, hakim dalam kamar telah menyatakan bahawa beliau tersilap dalam memikirkan bahawa petisyen menindas tersebut
B telah dikemukakan selepas syarikat tersebut digulungkan walhal pada hakikatnya petisyen menindas tersebut telah diperintahkan untuk digulungkan. Ini adalah rayuan oleh perayu.

Diputuskan, menolak rayuan tersebut (dengan majoriti):

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(1) (oleh **Abdul Hamid Mohamad** dan **Richard Malanjum HHMR**) Memandangkan satu petisyen penggulungan telahpun diberikan kepada syarikat tersebut dengan seorang penyelesai dilantik, aduan-aduan perayu tentang tindakan-tindakan penindasan dan tindakan-tindakan lain yang terangkum di bawah
D s 181 Akta tersebut dan sebagaimana yang terkandung dalam petisyen tersebut tidak boleh dikekalkan. Dari masa perlantikan penyelesai tersebut, ia adalah penyelesai yang mengendalikan urusan-urusan syarikat tersebut. Oleh itu ia sepatutnya terbuka kepada pihak yang terkilan untuk membawa aduan mereka kepada penyelesai tanpa merujuk kepada s 181 Akta tersebut.
E Dalam apa keadaan dan sebagaimana yang didapati oleh hakim yang bijaksana dalam mahkamah bawahan bahawa dalam kes semasa ia bukan penegasan perayu bahawa penyelesai yang dilantik telah membenarkan tindakan-tindakan menindas tersebut ataupun mempunyai kesan yang kekal (lihat ms 752D–E, 753H–I); *Webb v Stanfield* [1990] 8 ACL 715 diikut.

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(2) (oleh **Abdul Hamid Mohamad** dan **Richard Malanjum HHMR**) Satu lagi sebab yang memaksa kenapa petisyen tersebut tidak boleh dikekalkan selepas dibenarkan perintah penggulunggan ke atas syarikat tersebut dan perlantikan penyelesai adalah peruntukan s 223 Akta tersebut, yang
G memperuntukkan bahawa 'any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void'. Oleh itu, berdasarkan larangan ini, permohonan-permohonan dalam petisyen tersebut yang
H menghendaki responden pertama membeli saham-saham perayu dalam syarikat tersebut pada harga RM7,998,000 atau pada satu nilai yang adil yang akan ditaksirkan oleh sebuah firma juruaudit yang berasingan tidak boleh dilayan kecuali dengan sanksi mahkamah (lihat ms 754B–D).

I (3) (oleh **Abdul Hamid Mohamad** dan **Richard Malanjum HHMR**) Halangan lain dalam kes semasa adalah bahawa penyelesai tidak diganti atau ditambah sebagai satu pihak dalam

petisyen tersebut. Ia adalah sukar untuk mengikat penyelesai tersebut berhubung dengan satu perintah yang dibuat berdasarkan jualan saham-saham syarikat tersebut sebagaimana yang dipohon dalam petisyen tersebut (lihat ms 754D–E).

(4) (oleh **Abdul Kadir Sulaiman HMR** menentang) Syarikat tersebut hanya diperintahkan untuk digulungkan berdasarkan petisyen penggulungan responden pertama tiga hari selepas petisyen menindas tersebut dikemukakan oleh perayu. Oleh itu prima facie, memandangkan tarikh petisyen menindas tersebut dikemukakan, ia adalah satu petisyen yang sah. Oleh itu, perintah pembatalan petisyen menindas atas alasan bahawa syarikat tersebut telah diperintahkan untuk digulungkan adalah satu kuasa yang telah disalahgunakan (lihat ms 755G–H, 756B); *Webb v Stanfield* [1990] 8 ACLC 715, *Fargro Ltd v Godfroy* [1986] 1 WLR 1134 dan *Ferguson v Wallbridge* [1935] 3 DLR 66 dibeza.

(5) (oleh **Abdul Kadir Sulaiman HMR** menentang) Setelah meneliti perkara tersebut atas premis yang salah bahawa petisyen menindas tersebut telah dikemukakan selepas syarikat tersebut diperintahkan untuk digulungkan, alasan hakim Mahkamah Tinggi untuk membatalkan petisyen menindas tersebut atas alasan tersebut, tidak boleh disokong. Perayu tidak sepatutnya dihukum kerana membuat sesuatu yang ia berhak di bawah undang-undang untuk melakukan di mana syarikat tersebut belum lagi dalam penyelesaian. Melalui postskrip kepada penghakiman tersebut, hakim Mahkamah Tinggi yang bijaksana menyedari kesilapan yang telah dibuat oleh beliau sebelum ini dan ini menunjukkan bahawa perintah yang beliau buat berdasarkan permohonan responden-responden di bawah A 18 k 19 KMT dengan jelas adalah salah (lihat ms 756F–H, 757B).

(6) (oleh **Abdul Kadir Sulaiman HMR** menentang) Jika sedemikian keadaannya, tidak terdapat alternatif yang tinggal untuk meremitkan perkara tersebut kembali ke Mahkamah Tinggi bagi tujuan mendengar petisyen menindas tersebut atas merit (lihat ms 757D).]

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 440–483.

Cases referred to

Fargro Ltd v Godfroy and others [1986] 1 WLR 1134 (distd)

Ferguson v Wallbridge (1935) 3 DLR 66 (distd)

Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals [1995] 2 SLR 297 (distd)

Majumder v Attorney-General of Sarawak [1967] 1 MLJ 101 (refd)

A *Owen Sim Lian Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (distd)
Webb v Stanfield (1990) 8 ACLC 715 (folld)

Legislation referred to

B Companies Act 1965 ss 181, 118, 218(1)(i), 219, 223
Companies (Queensland) Code ss 320, (1)(a), (iv), 368(1)
Rules of the High Court 1980 O 18 r 19(i)(a), (b), (c), (d)

Appeal from: Originating Petition No D2–26–2 of 1996 (High Court, Kuala Lumpur)

C

Leong Wai Hong (*Loo Peh Fern* with him) (*Skrine & Co*) for the appellant.
Balvinder Singh (*Sri Ram & Co*) for the respondent.

Abdul Hamid Mohamad and Richard Malanjum JJCA: On 31 January 2003 by majority (Abdul Hamid Mohamad and Richard Malanjum JJCA)
D with Abdul Kadir Sulaiman JCA dissenting, we dismissed the appeal of the appellant.

The appellant was appealing against the decision of the High Court given on 31 March 1997 with postscript dated 30 May 1997 allowing the application of the first, second and third respondents to strike out the
E petition of the appellant ('the said petition') filed pursuant to s 181 of the Companies Act 1965 ('the Act') in respect of a joint venture company called the 'Trans-Pacific Hotels Sdn Bhd' ('the said company') set up by the appellant and the first respondent on equal equity shareholding.

It was not in dispute that on 18 October 1995, the first respondent filed
F a winding up petition ('the first petition') of the said company pursuant to s 218(1)(i) of the Act.

On 16 January 1996, the appellant filed the said petition seeking for various reliefs, namely:

(1)(a)that the first respondent be ordered to purchase the petitioner's 10,000 shares in the company at a price of RM7,998,000;

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(b) alternatively, that the first respondent be ordered to purchase the petitioner's 10,000 shares in the company at a fair value, taking into account the projected future income from the three Hotel Management Contracts, to be assessed by a firm of independent auditors, and that directions be given as to:

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(i) the date at which such fair value is to be assessed; and
(ii) the basis on which such fair value is to be assessed;

(2) that the second, third and fourth respondents be ordered to pay to the company and/or petitioner the sum of (RM7,998,000 x 2) or damages to be assessed with interest at 8%pa or such rate as this court deems fit from a date this court deems fit to date of full payment;

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(3) that a civil action be brought in the name of the company against the second, third and fourth respondents for breaches of fiduciary duties, s 132(1) and s 132C(1) of the Malaysian Companies Act;

(4) that the first, second, third and fourth respondents effect the appointment as directors of the company two persons nominated by the petitioner within seven days from the date of this order; A

(5) the fourth respondent tenders his resignation as a director of the company within seven days from the date of this order;

(6) that the first, second and third respondents remove the fourth respondent as a director of the company within seven days from the date of this order; B

(7) further and/or alternatively, such other order as this honorable court deems fit;

(8) that the costs of this application be paid to the petitioner by the first, second, third and fourth respondents.

On 19 January 1996, the first petition was heard with the winding up order being granted. C

Thereafter, on 26 March 1996 the first, second and third respondents filed a summons in chambers (encl 18) seeking for the following orders, namely:

1 that the petition dated 16 January 1996 be struck out pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980; D

2 that the costs of and arising out of this application be paid by the petitioner to the first, second and third respondents;

3 such further and other orders as this honorable court deems fit.

That summons in chambers was heard before the senior assistant registrar ('SAR') who dismissed it. The respondents appealed to the judge in chambers who heard the appeal and allowed it thereby effectively striking out the said petition as against the first, second and third respondents. E

Brief factual background

It was common ground that the appellant and the first respondent agreed to form a joint venture company intended to go into hotel management services. A joint venture agreement was therefore entered into by the parties and subsequently the said company was incorporated with the parties having equal equity shareholdings. As directors of the said company the first respondent nominated as its nominees the second and third respondents while the appellant nominated the fourth respondent. F G

On 23 November 1991, the appellant executed a management support services agreement with the said company to provide management support and other services in connection with the hotel operation and management business of the said company.

The said company then entered into three hotel management contracts with three hotel owners and/or operators of hotels, namely, 'The Residence' of Kuala Lumpur, 'Pangkor Laut Resorts' at Pangkor Laut Perak and 'The Hendrick' in Kuala Lumpur. H

The arrangement of the parties did not work out well as intended.

There was firstly the removal of the fourth respondent by the appellant as its president and chief executive officer followed by his resignation as a director of the appellant. I

A However, the fourth respondent remained with the said company. That was not welcomed by the appellant which went on to seek for his removal by the said company.

There were then discussions between the appellant and the first respondent on the future of the business venture of the said company in B view of the resignation of the fourth respondent as a director of the appellant. However while figures were being worked out on the values of the shares of the said company, the first respondent informed the appellant that the management support services agreement and the three hotel management contracts had been terminated by the parties thereto. The appellant did not accept the decision to terminate those agreements.

C In the interim and on the basis of the termination of those agreements, the first petition was filed by the first respondent.

Subsequent events

D As stated earlier, three days after the said petition was filed the first petition was heard and the result was that the said company was ordered to be wound up. There was no appeal lodged by any party against the winding up order.

Subsequently, the application by the respondents to strike out the said petition came up for hearing before the SAR and then an appeal to the judge E in chambers. In his grounds of judgment dated 11 April 1997, the learned judge in the court below when coming to his decision understood as a fact that the said petition was filed after the winding up order was made. However that was later on corrected by the solicitors for the appellant upon receipt of the grounds of judgment. That prompted the learned judge to issue a postscript dated 30 May 1997. But there was no reversal of his F decision that he made earlier on.

This is how the learned judge responded to the situation:

> Had I not made the error, what I would have to consider was a case where the position of an oppression petition, although presented before a company had G been ordered to be wound up, came to be considered after the company had been ordered to be wound up. *Webb v Stanfield* was such a case, and the question would still remain whether there could be a case for oppressive conduct after a liquidator has taken over the affairs of a company following a winding up order.
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> HIH's solicitors have requested that I review my decision in view of the error, H which they say, citing authorities, I am not precluded from doing.
>
> I do not feel it would be right for me to do so, even if I were not precluded from doing so, as the defendant's counsel might still wish to argue on the appeal that, on a broader view of *Webb v Stanfield* and the authorities cited therein, or for some other reasons, I was right to strike out the oppression petition. I feel I ought to let my decision remain for the Court of Appeal to finally adjudicate upon. I

Hence, effectively nothing came out of that postscript as to warrant any objection that there were two judgments in this case.

The grounds of appeal and contentions

The gist of the complaint of the appellant was that there was no justification in allowing the striking out application of the respondent since there were factual disputes, that the learned judge made a wrong finding of fact, that the respondent did not come to court with 'clean hands' and that it was an error to prefer the decision in *Webb v Stanfield & Anor* (1990) 8 ACLC 715 in view of the Federal Court decision in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113.

In his submission learned counsel for the appellant contended, inter alia, that s 181 of the Act is wider than the equivalent provisions in Australia and United Kingdom. He therefore argued that the decision in *Webb v Stanfield* should not be adopted in Malaysia in view of the decision in *Owen Sim* which propounded that an oppressive act or acts might have ceased but if the effect or effects remained then that would be within the ambit of s 181.

In reply, learned counsel for the respondent submitted, inter alia, that the time of filing of the said petition was not important. The crucial issue is that a winding up order has been granted to wind up the said company. He also referred to s 223 of the Act which prohibits the transfer of shares of a company on being wound up. And it was further contended that to allow the said petition to remain would disregard the presence of the liquidator who was appointed upon the winding up of the said company being granted. Another point raised was that upon winding up of the said company the shareholders became mere contributories. Thus s 181 would no longer be relevant.

Findings

In coming to our decision as we did, we accepted the fact that the said petition was filed before the winding up order of the said company was granted. We also noted the fact that the said petition was filed pursuant to s 181 of the Act. And of importance is the fact that the said company is now being administered by a liquidator appointed upon the granting of the winding up order.

Accordingly, the issue that confronted us and the learned judge in the court below was whether the said petition should be allowed to remain in view of the fact that a winding up order has been granted to wind up the said company. Indeed, we think that this is a preliminary point and which the appellant should surmount before it can go any further with the said petition. And our task was made difficult with the admission of learned counsel for the parties of the absence of judicial authority addressing directly on the point. We were therefore urged, as was the learned judge in the court below, to consider the decisions in *Webb v Stanfield* on the one hand and *Owen Sim* and *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals* [1995] 2 SLR 297 on the other.

Now briefly, in *Webb v Stanfield* the fact was that Webb and Stanfield had a business together under a company called Webb and Stanfield Associates Plc. However Webb was not happy in that Stanfield had

A allegedly started another company in competition with their business. So Webb applied for certain orders under s 320 of the Companies (Queensland) Code, an equivalent to our s 181 of the Act. In turn Stanfield applied for the winding up order of their company on the ground of insolvency. At the direction stage of the application of Webb the learned judge heard together the applications of the parties with the result that
B Webb's application was dismissed while Stanfield succeeded to obtain an order to wind up their company. On appeal by Webb the Supreme Court of Queensland dismissed it. And the court found that although the judge was in error for considering the merits of the case at the direction stage nevertheless the appellate court ruled that the result was correct.

C It was one of the prayers of Webb that Stanfield purchase his shares in their company. However the appellate court held that since the company was being wound up s 368(1) of the Companies Code prohibited the transfer of shares in such a situation.

It was further held by the appellate court that even if s 368(1) could be
D overcome, s 320(1)(a) would no longer be applicable because the company's affairs were already in the hands of the liquidator and thus it would be impossible for Webb to prove that the affairs of the company 'are being conducted' in an oppressive manner.

Moreover, the appellate court was also of the view that the acts of Stanfield that were complained of did not fall within the terms of
E s 320(1)(a)(iv) of the Companies Code as therein referred to acts 'by and on behalf of the company'.

For the appellant, reliance was placed upon the cases of *Kumagai Gumi Co Ltd* and the decision of our Federal Court in *Owen Sim*. It was the submission of learned counsel for the appellant that the granting of the
F winding up order should not bar the appellant from pursing other reliefs against the respondents under the said petition.

Unfortunately, Owen Sim was not dealing with a petition related to a company that was being wound up. Hence, it did not answer the primary issue at hand. In that case, the court was only faced with an application
G made under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out a petition filed under s 181 of the Act.

But unlike the present case, there the company was still a going concern. Thus, we do not think that case is of much help to the appellant on this primary issue.

H In respect of *Kumagai Gumi Co Ltd*, the reliefs prayed for under an oppression petition filed, inclusive of an order to wind up the companies concerned, were granted although there was also a winding up petition presented which the trial court finally did not grant in view of its findings and orders made under the oppression petition. The Singapore Court of Appeal, while disallowing in parts the findings and orders made by the trial
I court, generally approved the approach taken.

But we do not think *Kumagai Gumi Co Ltd* is an authority to say that relief can still be granted under an oppression petition despite a company

being wound up. In that case the oppression petition and the winding up petition were heard together. In fact even in *Webb v Stanfield* the two applications were heard together. Yet the appellate court took the view that the reliefs prayed for in the oppression application could no longer be entertained following the granting of the winding up order. In the present case, the position was worse off since the said petition was not even set down for hearing when the winding up order was granted.

The learned appellate judge in *Kumagai Gumi Co Ltd* also said this:

> But the appointment of liquidators is no bar to other reliefs, if appropriate. It depends on the facts of the particular case, and the orders to be made by the court (subject to the limitation we have discussed) are ultimately discretionary. (Per LP Thean JA at p 319.)

In our view however the foregoing statements have to be read in the context of the facts and events of that case, in particular, the fact that the petitions were heard together and the decision of the trial judge to grant the reliefs prayed for under the oppression petition whilst dismissing the winding up petition. Further, in that case it was only a provisional liquidator that was appointed before the hearing of the petitions and not a liquidator appointed following the granting of a winding up order.

Now, having considered the contentions of learned counsel for the parties and the authorities cited, by majority, we were inclined to accept the proposition of law as expounded in *Webb v Stanfield*. In other words, since a winding up order has already been granted to wind up the said company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s 181 of the Act and as contained in the said petition could no longer be sustained. In *Webb v Stanfield* this is what the appellate court said at p 719:

> But to admit that the proceedings by the applicant under s 320 may continue unabated is to ignore the fact that the company is presently in the process of being wound up under an order of this court that remains unchallenged.

Indeed in our view the appointment of the liquidator has a bearing on the fate of the said petition. And that appeared to be the view expressed in some cases in other common law jurisdictions. In *Fargro Ltd v Godfroy and others* [1986] 1 WLR 1134, Walton J said this at p 1136:

> But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested.

And in *Ferguson v Wallbridge* (1935) 3 DLR 66 (PC), Lord Blanesburgh discussed the issue in this way at pp 82–83:

> The question next arises whether they are also right in their further contention that this claim cannot be maintained or prosecuted in an action constituted as the appellant's action is. And, as the company is no party to that action, the answer must, their Lordships' think, clearly be in the negative. But assuming that by amendment the company were to be added as respondent, the Board,

A let it also be assumed, having power to direct such an amendment to be made, could the appeal then be maintained? This is the real question, and quite clearly, in their Lordships' judgment, it could have been so maintained if the company were not in liquidation. *Cook v Deeks* [(1916) 27 DLR 1] is clear authority for this. But could it be so maintained now that the company is assumed to be in liquidation? And the answer must again, as their Lordships B think, be in the negative.

In coming to our conclusion, we were aware of the argument that in *Owen Sim*, it was the opinion of the Federal Court that in view of the wordings in s 181 of the Act it has a wider implication when compared with similar provisions in Australia and United Kingdom. This is how the Federal Court C expressed its view on that issue at p 129:

> Now, it is inaccurate to state as a proposition of law that because of the present tense of the language appearing in s 181(1)(a), the oppression complained of must in every case continue right up to the date of the presentation of the petition. Indeed, Lord Wilberforce himself recognized this when he referred to a last minute correction as not having the effect of avoiding an inference of D a propensity to oppress. But the reference by his Lordship to a last minute correction is but a mere illustration of a much wider principle. It is this.
>
> Paragraph (a) to the first sub-s of s 181 is not, as observed by Lord Wilberforce, directed at specific or particular acts or omissions. It is directed at the nature of the conduct complained of. And where attention is called to particular acts or omissions, it is the effect of these which has to be considered. E It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoer.
>
> A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its *effects* may be permanently felt. For the purposes of s 181(1)(a), it is sufficient that the *effects* F of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition'. (Emphasis added.)

G Whilst we are clear of the opinion of the Federal Court, unfortunately it is no answer to a company wherein a winding up order has been granted, as in the instant case, with a liquidator having been appointed. We are therefore substantially in agreement with the view of the learned judge in the court below that it cannot be said that the effect or effects of an oppressive act or acts complained of would continue to subsist upon the granting of a H winding up order of a company and followed by an appointment of a liquidator. From that point in time it is the liquidator who is running the affairs of the company. It should therefore be opened to the aggrieved party to bring his complaint to the liquidator without having to resort to s 181 of the Act. In any event and as found by the learned judge in the court below that in the instant case, it was never the contention of the appellant that the I liquidator appointed had allowed either the oppressive act or acts or its effect or their effects to subsist. Indeed in *Webb v Stanfield*, the appellate court said this at p 719:

> Paragraph (a) of the subsection speaks of a member who believes '(i) that affairs of the company are being conducted in a manner that is oppressive ...' to him. *The 'affairs of the company', in so far as they exist at all in a winding up, are now being conducted by a liquidator, who is an officer of the Court*: see r 73(1). It is impossible to sustain a rational belief that the liquidator now in control of the company is conducting those affairs in a manner that is in any way oppressive to the applicant in this matter. If he were found to be doing so, the appropriate remedy would be to apply to the court for directions to be given that the liquidator discontinue such conduct. (Emphasis added.)

Another compelling reason in our view why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator is the provision of s 223 of the Act. The section reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Thus in view of this prohibition, prayers (a) and (b) of the said petition cannot be entertained unless sanctioned by the court. That was also the issue that prompted the appellate court in *Webb v Stanfield* to agree with the final conclusion of the court below. Further, in the instant case there was another obstacle in that the liquidator was not substituted for or added as a party in the said petition (see *Ferguson v Wallbridge*). It would then be quite difficult to bind the liquidator in respect of an order made on the sales of shares of the said company as prayed for in the said petition (see *Majumder v Attorney-General of Sarawak* [1967] 1 MLJ 101).

We have also considered the other arguments of the parties but we do not think we should deal with them in any detail as whatever our findings on them would not materially affect the conclusions that we have, by majority, arrived.

For the reasons above that, by majority, we dismissed the appeal of the appellant with costs.

My learned brother, Abdul Hamid Mohamed JCA has read this judgment in draft and expressed his agreement and the reasons therefore.

Abdul Kadir Sulaiman JCA (dissenting): The brief factual background has already been dealt with by my learned brother Richard Malanjum JCA in his judgment reported in (2003) 2 CLJ 445 and I am therefore spared from repeating it here, except that for the purpose of this judgment, certain aspects of the matter need to be highlighted.

At all material times, the directors of the company, the product of a joint venture between the appellant and the first respondent, were the second to the fourth respondents. The appellant which in the beginning had the fourth respondent as its nominee appointed as a director in the company, was left without one when the fourth respondent subsequently left its employment to join the first respondent without relinquishing his position as a director in the company, representing the appellant.

Subsequently a dispute arose between the appellant and the first respondent over the management of the company resulting in the first respondent filing a petition for the winding up of the company under s 218 of the Act on 18 October 1995. However the winding up order was only made on 19 January 1996. For the appellant, he also filed a petition for the winding up of the company under s 118 ('the oppression petition') on 16 January 1996 which was three days before the making of the order for winding up under s 218 in favour of the first respondent.

The oppression petition of the appellant was met by the summons in chambers of the first, the second and the third respondents of 26 March 1996. The fourth respondent was not a party to this summons in chambers. It was an application to strike out the appellant's oppression petition under O 18 r 19 of the RHC. This application of the respondents was heard by the learned SAR who dismissed it.

Being dissatisfied with the said decision, the respondents appealed to the judge in chambers. The learned judge on 31 March 1997 allowed the appeal and ordered the striking out of the oppression petition of the appellant. It is against this decision that the appellant is seeking redress before us.

According to the judgment of the learned judge of 11 April 1997, the appeal by the respondents was allowed solely on the ground that the oppression petition was presented after the company has been ordered to be wound up.

The learned judge so held on the authority of *Web v Stanfield & Anor*. He said in his judgment:

> at the date of the petition the perpetrators are no longer running the company and exercising the powers of directors because the company is now under the charge of a liquidator? Could those words of para (a) of sub-s (1) of s 181 apply to the governance of the liquidator? I did not think that what could be said of the perpetrators could be said of the liquidator. I did not think it could be said that by letting the effects of the act or omission continue and not doing anything to neutralize them, the liquidator is running the company oppressively...
>
> I was of opinion that, where the oppression petition is presented after a company has been ordered to be wound up, the authority that is appropriate is *Webb v Stanfield* and not *Owen Sim*, because *Owen Sim* was not such a case.

The learned judge is correct in so saying if the factual situation is correct in that the oppression petition was presented after the company was ordered to be wound up. But the situation's to the contrary. The company was only ordered to be wound up upon the petition of the first respondent, three days after the presentation of the oppression petition by the appellant.

Further, *Webb v Stanfield*, in my view, could easily be distinguished on the facts because the company there was ordered to be wound up on the ground of insolvency whereas in the case before the learned judge, the winding up application by the first respondent was not on that ground thereby leaving the company solvent even after the winding up. In any event, if the learned judge were not misled by the factual history of the two opposing applications for winding up, he would have realized that at the

date of the presentation of the oppressive petition by the appellant, the winding up order in favour of the first respondent had not yet been made, the company was still a going concern. So, the issue of 'there could be no oppressive conduct since the liquidator had taken over the affairs of the company' would not have arisen, and if it ever arise, the matters prayed for in the oppression petition would not in any way affect the creditors of the company.

Prima facie, therefore, as on the date of the presentation on the oppression petition, it was a valid petition and to have struck off the said petition on the ground that the company had been ordered to be wound up was truly a power wrongly exercised.

In his judgment, my learned brother Richard Malanjum JCA cites *Ferguson v Wallbridge* and *Fargro Ltd v Godfroy & Ors*. In *Ferguson v Wallbridge*, at the time the action was taken by the plaintiff, the company was already in liquidation. In the action as framed the company was not made a party. It was held that as the company was in liquidation, the claims were competent only to the company and as such the plaintiff had no standing to sue the defendant. However, in the matter of the present appeal, the company was not in liquidation at the time of the presentation of the oppression petition by the appellant. Hence, in my view, that case is of no authority in deciding the matter before us now.

In *Fargro Ltd v Godfroy & Ors* before the writ was issued the company went into liquidation as in the preceding case. However, in this suit the company was the fourth defendant. On an application by the defendants for an order that the action was improperly constituted and be struck out, the court allowed the reconstitution of the action with the permission of the liquidator for the action to be brought by the liquidator in the name of the company. Again, this case is distinguishable from the case before the learned judge because when the oppression petition was presented, the company, the subject matter before us, was a going concern and its subsequent winding up on just and equitable grounds would not in any way affect the solvency of the company vis a vis its creditors.

The learned judge in the present case before us having approached the matter upon a wrong premise that the oppression petition of the appellant was presented after the company had been ordered to be wound up, his reasoning for the striking out of the petition of the appellant on that ground cannot therefore be supported. The appellant should not have been penalized for doing something which he was entitled under the law to do when the company was then not in liquidation. The learned judge by his postscript to judgment dated 30 May 1997 realized the mistake he made earlier for, he said:

> The solicitors for HIH, the petitioner company, have drawn my attention to a mistake of fact on my part at p 12A of my judgment dated 11 April 1997, which mistake is also apparent at p 11 C-D. I had thought that in this case the oppression petition was presented after the company had been wound up. The correct position is that the oppression petition was presented before the company was ordered to be wound up ...

A Had I not made the error, what I would have to consider was a case where the position of an oppression although presented before a company had been ordered to wound up came to be considered after the company had been ordered to be wound up. *Webb v Stanfiel* was such a case and the question would still remain whether there could be a case for oppressive conduct after a liquidator had taken over the affairs of a company following winding-up
B order.

By the postscript, the learned judge had property addressed his mind on the matter. Hence, the striking out order he made upon the respondents under O 18 r 19 of the RHC in the application is clearly erroneous.

However, as to the question the learned judge posed in the above
C passage it remained unanswered by him. This I feel is for the reason that when requested for a review of his earlier erroneous decision the learned judge was of the view that it would not be right for him to do the review. The learned judge was right here in not attempting to review the matter which by then was functus officio. Further, the very question posed, raises a serious question to be tried on the petition of the appellant which would
D defeat the application of the respondents under O 18 r 19 of the RHC.

Speaking for myself sitting in the Court of Appeal, such being the position, there is no alternative left but to remit the matter back to the High Court for purpose of hearing the oppression petition of the appellant on the merit because as stated earlier, prima facie on the facts, the appellant was
E entitled to present such a petition because the company was at that point of time not faced with the order for the winding up except that by s 219 of the Act, its winding up was deemed to have commenced at the time of the presentation of the s 218 petition by the first respondent on 18 October 1995. The learned judge ought to have dismissed the application of the respondents under O 18 r 19 of the RHC and to proceed with the hearing
F of the oppression petition of the appellant on its merits.

I accordingly allow this appeal with costs here and below and make an order that this matter be remitted back to the High Court for the disposal of the petition of the appellant on the merits. The decision of the learned SAR is hereby affirmed.

G *Appeal dismissed.*

Reported by Lim Lee Na

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